

1502621 (Migration) [2016] AATA 3513 (8 March 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Abdirahman Hassan Ibrahim Waeis

VISA APPLICANTS: Ms Bisharo Abdullahi Osman
Master Mohamed Waeis

CASE NUMBER: 1502621

DIBP REFERENCE(S): OSF2013/100807

MEMBER: Hugh Sanderson

DATE: 8 March 2016

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2) of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 08 March 2016 at 9:35am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 January, 2015 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 4 July, 2013 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant.

BACKGROUND

4. The review applicant was born in Somalia and is currently 31 years old. He is an Australian citizen. His parents and five siblings all reside in Australia.
5. The first named visa applicant (hereinafter "the visa applicant") was born in Ethiopia and is currently 23 years old. Her parents and five siblings all live in Ethiopia. The second named visa applicant is her son who was born on 21 November, 2014. It is claimed that he is the son of the review applicant.
6. The parties claimed that they were introduced to each other over the Internet on 1 January, 2011. They continued to communicate with each other over the Internet and by telephone after that date. The review applicant travelled to Ethiopia in August 2012 to meet the visa applicant in person. They decided to get married and were married on 10 September, 2012. There is nothing to indicate that the marriage between the parties is not valid. The review applicant returned to Australia on 11 December, 2012.
7. The review applicant's movement records indicate that he has travelled out of Australia as follows:
 - From 17 August, 2012 to 11 December, 2012;
 - From 24 February, 2014 to 23 June, 2014; and
 - From 18 December, 2015 to 16 January, 2016.
8. The delegate who considered the application noted the following issues:
 - There was limited information as to the financial aspects of the relationship with the money transfers only commencing six months before the application was filed indicating they were contrived and not a genuine reflection of the relationship;
 - There was no evidence to support the claims that the parties had been living together while the review applicant was in Ethiopia;

- The photos from the wedding indicated a very small ceremony which is inconsistent with the normal customs of Ethiopia;
 - There was no evidence that the parties participated in other traditional ceremonies associated with weddings;
 - One of the witnesses in support of the application claimed to have been in Ethiopia at the time of the wedding, however this was inconsistent with his movement records;
 - The parties had met each other very shortly before their wedding and there was no evidence which would indicate they were committed to their relationship; and
 - Overall, there was limited information in support of the application.
9. In his statement, the applicant explained that the Prime Minister of Ethiopia, Meles Zenawi, died in office on 20 August, 2012 which meant the usual celebrations associated with a wedding could not be held as the nation was in mourning. He said a second celebration for the marriage was conducted several days after the marriage which was the celebration Sheikh Omar attended.
10. Taking into account these considerations, the delegate was not satisfied that the visa applicant was the spouse of the review applicant as defined in s.5F of the Act and therefore the visa applicant did not satisfy the criteria in cl.309.211 and cl.309.221. Accordingly the application was refused.

INFORMATION TO THE TRIBUNAL

11. The applicant provided further information to the tribunal in support of the application including the following:
- Hospital issued birth certificate of the parties child, Mohammed Abdirahman Waeis born on 21 November, 2014;
 - Certificate of Australian Citizenship by Descent issued 7 June, 2015 for the parties son;
 - Evidence of money transfers from the review applicant to the visa applicant;
 - Statements from friends and relatives in support of the application; and
 - Statement by the applicant.
12. The review applicant appeared before the tribunal on 7 March, 2016 to give evidence and present arguments. The tribunal also received oral evidence from the review applicant's parents and the visa applicant. The review applicant was represented in relation to the review by his registered migration agent who attended the hearing.
13. The parties gave consistent information as to various aspects of their lives together. This included where they were each living, the circumstances of their lives, aspects of their respective families lives and details of what they had done together when the review applicant travelled to Ethiopia in 2015/2016. They provided details of their plans together in Australia if the visa applicant were granted the visa to enter Australia.
14. The review applicant confirmed that his son had been granted Australian citizen by descent after having provided to the department evidence of his paternity of his son. He provided

details of the arrangements for his son as well as the care that he provided for him when the review applicant was in Ethiopia.

15. The review applicant's parents gave consistent information about their interaction with the visa applicant. The review applicant's father has returned to Ethiopia on two occasions, the first to attend the wedding between his son and the visa applicant and was in Ethiopia at the time of the birth of his grandson. He confirmed that when in Ethiopia he stayed in the home which he owns and in which the visa applicant is living in Jijiga.
16. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the parties are in a genuine and continuing relationship._

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

18. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

20. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married in Ethiopian on 10 September, 2012. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

21. The visa applicant is living with her son in a home owned by the review applicant's father. She does not pay any rent to live there. Although the home is owned by the review applicant's father, the tribunal accepts that the financial arrangement whereby the visa applicant is living there is indicative of a genuine and continuing relationship.
22. The visa applicant was previously employed as a midwife. She stopped working soon after giving birth to her son to care for him. She is now dependent upon the financial support provided by the review applicant. The tribunal accepts that the review applicant was also

providing financial support to the visa applicant prior to her obtaining employment as a midwife.

23. There is little further information as to the financial aspects of the relationship. This is not surprising as neither the visa applicant nor the review applicant has any significant assets and they live in separate countries. Overall, the tribunal is satisfied that the financial aspects as they stand indicate the parties are in a genuine and continuing relationship.
24. As the parties live in separate countries, there is little opportunity for them to establish a household together. The review applicant has, since his marriage to the visa applicant, return to Ethiopia on two occasions. The tribunal finds that when in Ethiopia the parties have lived together and shared their home. Most recently, the review applicant was actively participating in caring for his child. The tribunal finds the parties established a household together Ethiopia and that the living arrangements of the parties established when together are indicative of a genuine and continuing relationship.
25. The parties have provided a number of statements from friends and relatives which support the claim that the parties represent themselves being married to each other and that this relationship is known and accepted by their friends and relatives. The review applicant's parents gave evidence before the tribunal as to their knowledge of the relationship and their discussions with the visa applicant's parents as to that relationship.
26. Apart from the wedding and the associated celebrations that took place, the visa applicant and the review applicant have attended various social functions when together in Ethiopia. The tribunal finds that the parties have represented themselves to their friends and relatives as being married to each other and that this relationship is recognised by those people.
27. The parties were first introduced to each other over the Internet in January 2011. They first met each other in person when the review applicant travelled to Ethiopia in August 2012 and they were married on 10 September, 2012. The parties now been married for more than three years.
28. The parties have a child together. This child was born on 21 November, 2014 and would have been conceived when the review applicant was in Ethiopia, returning to Australia on 24 February, 2014. The parties child has been granted by the Australian authorities citizenship by descent. Photos have been provided showing the parties together with their child. The review applicant's mother spoke in glowing terms of her grandson.
29. The fact that the parties have had a child together and this child has been granted citizenship by descent by the department must be given significant weight when considering the genuineness of the relationship between the parties.
30. The parties have provided information as to their plans for their future together in Australia. This entails the parties living together in Canberra where the review applicant is currently employed. The tribunal finds that the fact the parties have been able to set out their future plans for their life together in Australia and that they have already had a child together indicates the degree of companionship and emotional support they draw from each other and that they consider their relationship as long-term. Overall, the tribunal is satisfied that the nature of the commitment the parties have displayed to each other indicates a genuine and continuing relationship.
31. The tribunal has considered the circumstances of the parties both individually and cumulatively. The most significant fact in the relationship of the parties is that they have had a child together who has been granted Australian citizenship by descent. This fact must be given significant weight when considering the relationship between the parties. When

considered as a whole, the tribunal is satisfied that the weight of evidence indicates the parties are in a genuine and continuing relationship with each other. The tribunal is satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that they do not live separately and apart on a permanent basis and, when given the opportunity, will immediately commenced living together.

32. Given these findings the tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
33. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
34. Given the findings above, the appropriate course is to remit the applications for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa. It is noted that the second named visa applicant is an Australian citizen and therefore his application for a visa may not be required.

DECISION

35. The tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211(2) of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).